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1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MASSACHUSETTS

3 -----X

4 LIFE IS GOOD, INC.,

5 Plaintiff

6 Civil Action

7 vs. No. 04 11290 REK

8

9 LG ELECTRONICS U.S.A., INC. and

10 LG ELECTRONICS MOBILECOMM U.S.A.,

11 INC. (formerly LG INFOCOMM U.S.A.,

12 INC.),

13 Defendant

14 -----X

15 DEPOSITION OF THOMAS KENNEY, a witness called

16 by and on behalf of the Defendants, taken pursuant to

17 Rule 30(b) (6) of the Federal Rules of Civil Procedure,

18 before Nicole E. Guilbert, a Notary Public in and for

19 the Commonwealth of Massachusetts, at Finnegan,

20 Henderson, Farabow, Garrett & Dunner, LLP, 55 Cambridge

21 Parkway, Cambridge, Massachusetts, on Thursday,

22 November 17, 2005, commencing at 9:21 a.m.

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Exhibit 10 to
Lemper Declaration

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1 A. I have not seen this before today, I don't 09:58:51
2 believe, and I'm not aware of anyone at my firm seeing this 09:58:57
3 before. 09:59:01

4 Q. And did you review the -- your files to look for 09:59:01
5 all correspondence related to the application that is the 09:59:06
6 subject of Exhibit 43? 09:59:12

7 A. Yes. 09:59:13

8 Q. And did you locate any photographs related to or 09:59:14
9 resembling the photograph that appears on the backside of 09:59:22
10 page -- the last page of Exhibit 43? 09:59:26

11 A. I didn't locate anything that looks like this. 09:59:28

12 MR. SOMMERS: If I could have marked 09:59:31
13 as the next exhibit, 44, a multipage 09:59:33
14 document dated July 19, 1995. 09:59:48

15 (Exhibit 44, 7/19/95 Office Action,
16 marked for identification.) 10:00:04

17 Q. (By Mr. Sommers) Mr. Kenney, if I could have you 10:00:04
18 identify that for me? 10:00:07

19 A. This document is an office action sent by the U.S. 10:00:14
20 Trademark Office with respect to a Life is Good 10:00:22
21 application. 10:00:25

22 Q. And do you see the number that's at the bottom of 10:00:27

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1 that right-hand page? 10:00:32

2 A. Yes. 10:00:33

3 Q. And what number is that? 10:00:33

4 A. 002441. 10:00:36

5 Q. Do you know why that number appears there? 10:00:39

6 A. I believe that's a Bates stamp number provided 10:00:42

7 with respect to the production of documents to the 10:00:46

8 defendants in this case. 10:00:48

9 Q. Do you know where this document and -- let me 10:00:52

10 strike that. Mr. Kenney, have you seen this document 10:00:56

11 before? 10:01:00

12 A. Yes. 10:01:00

13 Q. If I could ask you to refer to the second page of 10:01:02

14 that document and, under the numeric paragraph that begins 10:01:10

15 with 3, ask you to read into the record the last sentence 10:01:19

16 of that paragraph. 10:01:22

17 A. The last sentence? 10:01:25

18 Q. Please. 10:01:26

19 A. "The proposed mark 'Life is Good' thus appears to 10:01:28

20 be a general comment on the merits of the simple life 10:01:32

21 without acting as a source identifier," and then in 10:01:37

22 parentheses, "trademark for applicants goods." 10:01:42

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1 Q. Do you understand -- let me strike that. Do you 10:01:46

2 have an understanding of the reason that the trademark 10:01:50

3 office made that comment? 10:01:54

4 A. I'm not sure I understand the reason why they made 10:02:01

5 that -- 10:02:04

6 Q. Do you -- 10:02:05

7 A. -- comment. 10:02:06

8 Q. -- understand the meaning of the language that the 10:02:06

9 trademark has included? 10:02:11

10 A. I think I do. 10:02:13

11 Q. And what would that be? 10:02:15

12 A. My understanding is the trademark office initially 10:02:20

13 took the position that the use of the word -- the words 10:02:24

14 "life is good" on the applicant's goods or the goods 10:02:30

15 submitted was simply -- or was used in an ornamental 10:02:43

16 fashion, meaning to make a statement rather than from the 10:02:48

17 trademark's -- trademark office's position to serve as a 10:02:56

18 source identifier. 10:02:59

19 Q. When you say, "make a statement," what do you 10:03:00

20 mean? 10:03:07

21 A. I think the trademark office would or -- was 10:03:07

22 taking the position that the use of the phrase "life is 10:03:13

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1 A. Yes. 10:30:52

2 Q. And what was Mr. Pierce's comments concerning 10:30:53

3 those facts? 10:30:59

4 A. My recollection was that his comments were that it 10:31:16

5 was our position and the client's position that the use of 10:31:24

6 the mark was not ornamental and that we, therefore, should 10:31:29

7 submit a response to the trademark office making those 10:31:38

8 arguments. 10:31:44

9 Q. If I could refer you to page 4 of Exhibit 45 -- 10:31:44

10 A. Yes. 10:31:49

11 Q. -- and the first paragraph, and if you could read 10:31:49

12 the first line into the record for me. 10:31:52

13 A. The first sentence? 10:31:54

14 Q. Please. 10:31:55

15 A. "In fact, previously the applicant manufactured 10:31:57

16 the subject goods with a patch stating 'Jacobs Gallery' 10:32:00

17 sewn into the outside back of the T-shirt." 10:32:07

18 Q. Could you explain to me what that means. 10:32:12

19 A. I understand it to mean that in -- at one time, 10:32:21

20 the applicant manufactured goods that had a patch sewn on 10:32:29

21 it that said "Jacobs Gallery." 10:32:34

22 Q. Would I be correct that the Jacobs Gallery would 10:32:38

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1 have been the name of the entity back then? 10:32:44

2 A. That's accurate, yes. 10:32:47

3 Q. Would I also be accurate in concluding that the 10:32:49

4 patch that appeared on the shirts was a patch which showed 10:32:57

5 where the product came from? 10:33:03

6 A. I don't know that. 10:33:10

7 Q. I guess what I'm trying to find out is were there 10:33:13

8 any labels sewn into the garments that showed who the 10:33:23

9 manufacturer of the T-shirt was, 10:33:33

10 A. That, I don't know. 10:33:34

11 Q. Would I be correct in assuming that this language 10:33:42

12 that appears on Exhibit 45 indicates that at some time 10:33:48

13 there was a patch with the name "Jacobs Gallery" sewn into 10:33:55

14 the outside back of the T-shirt? 10:34:02

15 A. That's what that says, yes. That's what that 10:34:04

16 sentence says, yes. 10:34:09

17 Q. Now, were there any other markings on the T-shirts 10:34:11

18 at that time other than the patch which is explained on 10:34:19

19 page 4 of Exhibit 45 and the various depictions that are 10:34:24

20 represented on the page bearing Bates Stamp Number 2432? 10:34:33

21 A. I don't know the answer to that question. 10:34:43

22 Q. Did you -- were you involved in any manner with 10:34:48

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1 December 3, 2001 as Exhibit 52. 11:49:47

2 (Exhibit 52, 12/3/01 Office Action,

3 marked for identification.) 11:50:08

4 Q. (By Mr. Sommers) Mr. Kenney, if you could 11:50:08

5 identify Exhibit 52 for me. 11:50:17

6 A. Sure. It is a -- an office action sent by the 11:50:19

7 U.S. Trademark Office in connection with a Life is Good 11:50:29

8 trademark application. 11:50:33

9 Q. Are you the individual that this is addressed to? 11:50:34

10 A. Yes. 11:50:37

11 Q. If I could refer you to the first paragraph that 11:50:42

12 says, "Registration Refused: Likely to confusion" -- 11:50:45

13 A. Yes.

14 Q. -- do you see that? 11:50:49

15 A. Yes. 11:50:52

16 Q. Do you see that? 11:50:52

17 A. I do. 11:50:53

18 Q. Can you explain to me what the purpose of that 11:50:54

19 paragraph is. 11:50:57

20 A. I believe the purpose is to indicate or to inform 11:51:02

21 the applicant that the trademark office has found or 11:51:08

22 located a prior registration -- in this case, registration 11:51:13

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1 A. I would assume that's accurate. 11:55:46

2 Q. Mr. Kenney, did you have an understanding of the 11:55:50

3 particular manner in which your client could respond to 11:56:01

4 this refusal? 11:56:05

5 A. Yes. 11:56:11

6 Q. And would I be correct that the manner in which 11:56:13

7 your client responded to the refusal was to amend the 11:56:19

8 pending application to delete the class to which the 11:56:26

9 refusal pertained? 11:56:30

10 A. I believe that's accurate. 11:56:32

11 Q. To your knowledge, did your client, in fact, 11:56:40

12 delete the class that pertained to beverages? 11:56:43

13 A. Yes. 11:56:51

14 Q. Do you have an understanding of whether this was 11:56:53

15 sufficient to remove the refusal that the trademark office 11:56:56

16 set forth in Exhibit 52? 11:57:02

17 A. I believe it was. 11:57:05

18 Q. And what was your understanding to the reason why 11:57:06

19 the refusal was removed? 11:57:10

20 A. It's my understanding that the refusal was removed 11:57:16

21 because the -- the goods that had been listed in the 11:57:23

22 application that the trademark office determined could 11:57:36

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1 don't know if it's the company's -- that -- 12:05:14

2 that he did not wish the Life is Good 12:05:17

3 trademark to be associated with alcoholic 12:05:22

4 beverages. 12:05:26

5 Q. (By Mr. Sommers) And that position 12:05:39

6 notwithstanding, am I correct that your client has never 12:05:43

7 sought cancellation of Miller's registration for Life is 12:05:51

8 Good for beer? 12:05:55

9 A. I don't believe that my client ever began any 12:05:56

10 proceedings to seek the cancellation of Miller's Life is 12:06:00

11 Good registration. 12:06:04

12 Q. Are you aware of any factual reason why? 12:06:07

13 A. No. 12:06:10

14 Q. To your knowledge, Mr. Kenney, did the deletion of 12:06:31

15 the class concerning beverages result in the successful 12:06:39

16 removal of the refusal to registration that's memorialized 12:06:47

17 on Exhibit 52? 12:06:58

18 A. I believe it did. 12:07:00

19 Q. Mr. Kenney, aside from specific designated goods, 12:07:27

20 does your client own a registration for just the phrase 12:07:34

21 "life is good"? 12:07:39

22 A. I'm not sure I understand the question. 12:07:46

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1 Q. Well, does Life is Good own a trademark 12:07:50
2 registration for the phrase "life is good" itself without 12:07:55
3 regard to any specific goods? 12:08:03
4 A. I believe all of the U.S. registration -- 12:08:08
5 trademark registrations that Life is Good, Inc. owns for 12:08:12
6 "life is good" are for particular classes listed in the 12:08:17
7 registration. 12:08:23
8 Q. And there's not a registration just for the words 12:08:23
9 that does not otherwise have some goods attached to it? 12:08:29
10 A. I believe that's accurate. 12:08:34
11 Q. Would you be the person that would be most 12:08:36
12 knowledgeable about that? 12:08:40
13 A. Probably. 12:08:42
14 Q. To your knowledge, does your client claim 12:08:57
15 trademark rights in the words "life is good" in gross? 12:09:06
16 A. Do we claim them in gross? 12:09:13
17 Q. Yes. 12:09:17
18 A. I don't believe so. 12:09:17
19 Q. Has your client, to your knowledge, ever claimed 12:09:18
20 that it owns proprietary rights to the ordinary meaning in 12:09:27
21 the English language of the words "life is good"? 12:09:35
22 A. I don't think so. 12:09:45

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1 Q. So would I be correct that -- let me strike that. 12:10:07

2 So would I be correct that your client does not claim any 12:10:14

3 proprietary rights to the words "life is good" as used as 12:10:22

4 part of ordinary English? 12:10:35

5 A. I guess I'm not -- I guess I'm not understanding 12:10:39

6 what "ordinary English" means. 12:10:43

7 Q. Perhaps -- point well taken. Let me ask again. 12:10:45

8 A. Thank you. 12:10:50

9 Q. Am I correct that your client does not claim 12:10:51

10 proprietary rights to the words "life is good" as those 12:10:57

11 words are used in the English language in a nontrademark 12:11:04

12 manner? 12:11:13

13 A. I don't believe that my client does make that 12:11:14

14 claim. I guess I should qualify that. To the extent that 12:11:28

15 someone, a third party, uses it in a way they believe is in 12:11:43

16 some common way or nontrademark way that my client may 12:11:51

17 believe, regardless of how it's used, that it is likely to 12:11:56

18 cause confusion, then -- I don't know if that's claiming 12:12:00

19 proprietary, but I think my client would be concerned about 12:12:04

20 that. 12:12:08

21 Q. I'm not sure I understand. Could you explain for 12:12:09

22 me. 12:12:11

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1 do know that that's been a source of notice of third-party 12:23:12

2 uses of "life is good." 12:23:18

3 Q. How long has that been in place? 12:23:20

4 A. I don't know. 12:23:22

5 Q. When is the first time you had knowledge that that 12:23:26

6 was a practice? 12:23:28

7 A. Probably been a few years, at least two years, I 12:23:34

8 think, and that's an estimate. I apologize. I don't 12:23:46

9 recall the specifics of the situation. 12:23:49

10 Q. Prior to filing any applications for the Life is 12:24:00

11 Good mark on behalf of our client, have you ever conducted 12:24:05

12 a trademark search to see if that trademark was available 12:24:09

13 for registration? 12:24:12

14 A. I don't recall doing that. 12:24:17

15 Q. Do you know if your client did that? 12:24:19

16 A. Again, John Jacobs mentioned in his deposition 12:24:24

17 that he believed he did that after the first application 12:24:27

18 was filed. Other than that testimony, I'm not aware of any 12:24:30

19 other searches. 12:24:35

20 Q. Mr. Kenney, in connection with the enforcement 12:25:19

21 efforts on behalf of your client, have you engaged in any 12:25:26

22 marketing studies, research, or surveys to determine the 12:25:37

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1 public recognition of your client's trademark Life is Good? 12:25:49

2 A. I have not. 12:25:54

3 Q. Are you aware of any others doing so? 12:25:56

4 A. In connection with enforcement, no. 12:26:01

5 Q. In connection with any other activities? 12:26:04

6 A. Not that I'm aware of other than in connection 12:26:10

7 with this litigation. 12:26:13

8 Q. And what specifically are you aware of? 12:26:14

9 A. My understanding is that a firm has been engaged 12:26:18

10 or will be engaged to conduct a survey. 12:26:25

11 Q. And what firm is that? 12:26:28

12 A. I don't remember the name of the firm. 12:26:31

13 Q. And what is the purpose of engaging the firm? 12:26:35

14 MR. KIRBY: Well, I think you're now 12:26:38

15 going beyond the scope of the deposition 12:26:40

16 notice, Mark. I mean, now you're really 12:26:42

17 going into this litigation. 12:26:45

18 MR. SOMMERS: But it is an 12:26:48

19 enforcement matter and the witness is 12:26:53

20 volunteering. 12:26:56

21 THE WITNESS: Well, because I was 12:26:56

22 asked. 12:26:57

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1 Q. When was the presurvey done? 12:32:45

2 A. Two weeks sounds about right. That's my estimate. 12:32:50

3 MR. SOMMERS: If I could have marked 12:33:41

4 as Exhibit 53 a document bearing the date 12:33:46

5 January 31. 12:33:49

6 (Exhibit 53, Rolex Correspondence,

7 marked for identification.) 12:34:03

8 Q. (By Mr. Sommers) Mr. Kenney, could you describe 12:34:03

9 for me what Exhibit 53 is. 12:34:07

10 A. The first page is a letter from an attorney who's 12:34:10

11 identifying himself as a firm representing Rolex. The 12:34:17

12 remainder of it appears to be a letter that I sent to 12:34:23

13 Rolex. 12:34:30

14 Q. Has there been any correspondence since January 31 12:34:31

15 between yourself and this firm? 12:34:36

16 A. I believe so. 12:34:39

17 Q. And what's that? 12:34:41

18 A. I believe there was a letter indicating that Rolex 12:34:43

19 was stopping or shortly stopping the use of the 12:34:55

20 advertisement in magazines. 12:34:59

21 Q. To your knowledge, would that document have been 12:35:05

22 produced to us? 12:35:07

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1 any research to determine the degree of consumer 12:40:47

2 recognition of its trademark Life is Good? 12:40:52

3 A. Other than the survey that I previously testified 12:40:54

4 about, not that I'm aware of. 12:40:58

5 Q. And that survey is being conducted as we speak? 12:41:01

6 A. Hopefully. 12:41:04

7 MR. SOMMERS: If I could have marked 12:41:25

8 as Exhibit 54 a document dated September 12:41:27

9 12. 12:41:45

10 MR. KIRBY: Off the record. 12:41:46

11 (Discussion off the record.) 12:42:01

12 (Exhibit 54, Avia Correspondence,

13 marked for identification.)

14 MR. SOMMERS: I have been corrected 12:42:02

15 by my very observant counsel in this matter 12:42:04

16 and been advised that Exhibit 54 is dated 12:42:06

17 September 12, 2001, for which I thank you. 12:42:08

18 Q. (By Mr. Sommers) Mr. Kenney, if you could 12:42:13

19 identify Exhibit 54 for me. 12:42:15

20 A. Okay. The first three pages are -- consist of a 12:42:16

21 letter sent to Robert Pierce from attorneys for, I believe, 12:42:29

22 it's Avia Corporation. The next two pages are a letter 12:42:34

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1 that Mr. Pierce sent back to Mr. Painter, who was the 12:42:49
2 author of the first letter -- I don't know I may have them 12:42:54
3 backward -- and then the remaining pages are a three-page 12:42:58
4 letter dated September 5, 2001 that Mr. Pierce sent to 12:43:08
5 Mr. Painter. 12:43:14

6 Q. Mr. Kenney, what was the particular use that Avia 12:43:16
7 was making? 12:43:19

8 A. My understanding -- I have a hard time remembering 12:43:26
9 the specific one -- but my understanding was it was some 12:43:37
10 type of advertising or promotional activity that Avia was 12:43:41
11 undertaking in connection with a show, a consumer show or 12:43:47
12 some type of business show, in which it was using the 12:43:57
13 phrase "life is good" but I don't remember the specifics of 12:44:03
14 it. 12:44:07

15 Q. Would I be correct that -- well, let me strike 12:44:11
16 that. What is your understanding of the disposition of 12:44:22
17 this matter? 12:44:27

18 A. My understanding is that -- my best recollection 12:44:28
19 of it is that Avia agreed to stop using "life is good" in 12:44:35
20 connection with its promotional efforts. That's my memory. 12:44:40

21 Q. Are you aware of whether Avia acknowledged your 12:44:47
22 client had any validity in this claim or not? 12:44:52

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1 not? 12:46:20

2 A. I believe they do. 12:46:21

3 Q. Regardless of what they feel about the merits of 12:46:25

4 the plaintiff's claim or not? 12:46:28

5 A. I believe they take issues of cost and time and 12:46:29

6 expenditure of time into account certainly. 12:46:38

7 MR. SOMMERS: If I could have marked 12:46:41

8 as the next exhibit, 55, an August -- 12:46:43

9 bearing the date August 26, 2004 on the 12:46:49

10 front page. 12:46:53

11 (Exhibit 55, Natural Life

12 Collections, Inc. Correspondence, marked

13 for identification.) 12:47:14

14 Q. (By Mr. Sommers) Mr. Kenney, could you describe 12:47:15

15 for me what Exhibit 55 is. 12:47:17

16 A. Yes. The first three pages are a letter to me 12:47:19

17 from an attorney for Natural Life Collections, Inc., 12:47:28

18 appears to have an attachment to it. The next pages appear 12:47:33

19 to be a letter that I sent to Natural Life. I think 12:47:46

20 there's an attachment there. The next page is a letter 12:47:53

21 that Karen Oliver from Life is Good sent to Mr. Young, the 12:48:05

22 attorney for Natural Life. 12:48:09

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1 The next page is an e-mail within Life is Good 12:48:13
2 about Natural Life. Then there's a page -- looks like a 12:48:19
3 page from a website, and there's another e-mail within Life 12:48:27
4 is Good regarding Natural Life and then a couple more 12:48:34
5 e-mails regarding Natural Life. 12:48:41

6 Q. And the whole group of documents that comprise 12:48:43
7 Exhibit 55 concern the use of "life is good" by Natural 12:48:48
8 Life Collections? 12:48:55

9 A. Yes. 12:48:55

10 Q. Mr. Kenney, to your knowledge, have any further 12:48:58
11 communications occurred between the parties since August 12:49:03
12 26, 2004? 12:49:07

13 A. Yes. 12:49:08

14 Q. And what's that? 12:49:08

15 A. Ms. Oliver's letter of October 19, 2005. 12:49:10

16 Q. Okay. And who's Ms. Oliver? 12:49:15

17 A. She is an attorney that works for Life is Good. 12:49:18

18 Q. Has there been any contact for -- with the 12:49:28
19 attorneys representing Natural Life with you, meaning Life 12:49:34
20 is Good or its representatives, since August 26, 2004? 12:49:41

21 A. You mean other than Ms. Oliver's letter? 12:49:45

22 Q. I'm referring to whether Natural Life has had any 12:49:48

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1 what has happened with respect to this issue since then. 12:56:05

2 Q. Do you know the reason why nearly fourteen months 12:56:08

3 passed before Ms. Oliver contacted this company? 12:56:17

4 A. I don't. 12:56:19

5 Q. Do you see on page 2 of that document that Natural 12:56:30

6 Life claims that it commenced use of the "life is good" 12:56:35

7 phrase in 1995? 12:56:40

8 A. I do see that. 12:56:42

9 Q. Would that fact have any bearing on your position 12:56:44

10 in connection with this matter? 12:56:48

11 A. I believe so because I believe Ms. Oliver has 12:56:52

12 requested information about that in her letter. 12:56:57

13 Q. And why would that be relevant? 12:56:58

14 A. In my mind, the extent of use by Natural Life 12:57:05

15 could be relevant to a determination of whether or not 12:57:14

16 their use is an infringement. 12:57:20

17 Q. How is it relevant? 12:57:24

18 A. Well, they're claiming that they used it first; 12:57:27

19 that they're the senior user of the mug or the -- of the 12:57:32

20 phrase. 12:57:37

21 Q. And what would that mean? 12:57:37

22 A. Well, if they're the senior user, then they would 12:57:39

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1 infringing. 13:01:29

2 Q. So if they have a priority of use, is it your 13:01:29

3 client's contention that it would not infringe its rights? 13:01:36

4 A. No. 13:01:41

5 MR. SOMMERS: Could I have marked as 13:01:59

6 the next exhibit a letter dated -- the 13:02:00

7 first page, a letter, being dated December 13:02:05

8 13, 2002. 13:02:09

9 (Exhibit 56, Hallmark Correspondence,

10 marked for identification.)

11 Q. (By Mr. Sommers) Before I turn to that, 13:02:25

12 Mr. Kenney, am I correct that Natural Life has refused to 13:02:28

13 cease its use of "life is good"? 13:02:34

14 A. At this point, that's my understanding. 13:02:36

15 Q. Do you know are they still using this in the 13:02:40

16 marketplace? 13:02:45

17 A. As far as I know, yes. 13:02:45

18 Q. If I could have you tell me what Exhibit 56 is. 13:02:48

19 A. The first page is a letter from an attorney for 13:02:54

20 Hallmark Cards to me. The second page is a two-page letter 13:02:59

21 that I sent to Hallmark Cards with an attachment -- 13:03:07

22 actually, a couple of attachments. I don't know if they're 13:03:14

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1 necessarily attached to the card but I mean attached to the 13:03:20

2 letter that I sent, but there are attachments which appear 13:03:24

3 to be greeting cards. 13:03:27

4 Q. Mr. Kenney, has there been any further 13:03:36

5 correspondence between you or your client and Hallmark 13:03:40

6 since December 13, 2002? 13:03:45

7 A. Not that I'm aware of. 13:03:50

8 Q. And what is the reason that you or your client 13:03:52

9 have not followed up with this matter? 13:03:54

10 MR. KIRBY: Let me caution the 13:03:56

11 witness that to the extent the answer to 13:03:58

12 the question would divulge the substance of 13:04:00

13 attorney-client communications, you should 13:04:04

14 not provide such testimony. 13:04:06

15 THE WITNESS: I don't think I can 13:04:11

16 comment on why my client necessarily hasn't 13:04:13

17 followed up, but the reason that nothing 13:04:17

18 further has come from my office has been 13:04:19

19 the result of discussions that my office 13:04:23

20 has had with my client. 13:04:27

21 Q. (By Mr. Sommers) Is it fair to conclude that you 13:04:32

22 and your client are not following up with this matter any 13:04:38

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1 Q. Is it also accurate to summarize that Hallmark 13:06:36

2 believed that your client's claim was ill-founded and would 13:06:43

3 not continue -- sorry. Let me strike that. Is it also 13:06:48

4 fair to summarize that Hallmark disagreed with your 13:06:53

5 client's claims of infringement and refused to stop? 13:06:56

6 A. That's certainly the position that they expressed 13:07:01

7 in the letter, yes. 13:07:04

8 Q. Could you describe for me the context of use of 13:07:17

9 "life is good" by Hallmark as depicted on Exhibit 56. 13:07:23

10 A. Appear to be a couple things that are, I guess, 13:07:28

11 greeting cards. The first one is it's a greeting card that 13:07:32

12 looks like a chocolate chip cookie or some type of cookie 13:07:39

13 and on the inside it says, "Life is good. Happy Birthday." 13:07:43

14 The second one is an another greeting card. I think "life" 13:07:46

15 didn't get printed out, but it does say, "Life is good," on 13:07:52

16 the outside; and then when you open it up, it says, "Happy 13:07:56

17 Graduation." 13:08:00

18 Q. Did you have an understanding at the time that you 13:08:06

19 wrote your December 2, 2002 letter to Hallmark as to 13:08:11

20 whether Hallmark was using the words "life is good" as 13:08:19

21 ordinary English words or as a trademark? 13:08:25

22 A. I don't recall what -- whether or not I had an 13:08:29

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1 Q. Mr. Kenney, I see that on the first page of 13:09:54
2 Exhibit 56 that it says, the marks -- strike that. 13:09:59
3 Mr. Kenney, I see on the first page of Exhibit 56 that 13:10:02
4 Hallmark informs you that it used the "life is good" phrase 13:10:08
5 on its greeting cards since 1989. Do you see that? 13:10:12
6 A. I do. 13:10:16
7 Q. Did that factor -- did that fact factor in to 13:10:16
8 whether or not your client took no further steps upon 13:10:20
9 receiving the December 13, 2000 [sic] letter from Hallmark? 13:10:29
10 A. I don't think I can answer that without divulging 13:10:33
11 my communications with my client. 13:10:36
12 Q. Would it have been a fact relevant to your 13:10:38
13 consideration? 13:10:41
14 A. I think so. 13:10:42
15 Q. Was it a fact relevant to your consideration? 13:10:43
16 A. My memory is that it was. 13:10:46
17 MR. KIRBY: How we doing for time, 13:10:56
18 Mark? 13:11:00
19 MR. SOMMERS: Probably make it if we 13:11:01
20 push, but I'd like to -- we can go off the 13:11:02
21 record. 13:11:05
22 THE VIDEOGRAPHER: The time is 1:10. 13:11:05

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1 We are off the record. 13:11:07

2 (Discussion off the record.) 13:17:41

3 (A brief recess was taken.) 13:17:47

4 THE VIDEOGRAPHER: The time is 1:17 13:18:01

5 p.m. This is the beginning of Cassette 13:18:03

6 Number 3. We are on the record. 13:18:06

7 MR. SOMMERS: If I could have marked 13:18:24

8 as the next exhibit, 57, a multipage 13:18:25

9 document, the first page being a letter 13:18:31

10 dated April 1, 2004. 13:18:34

11 (Exhibit 57, Benton Silkscreening

12 Correspondence, marked for identification.) 13:18:57

13 Q. (By Mr. Sommers) Mr. Kenney, could you identify 13:18:58

14 Exhibit 57 for me. 13:19:03

15 A. Yes. The first two pages consist of a letter from 13:19:04

16 Sam Reed to a company called Benton screen -- 13:19:11

17 Silkscreening. Sorry. There's an attachment, something 13:19:20

18 from the American Red Cross. I guess it's from their 13:19:23

19 website. And there's a second page from the website with 13:19:29

20 some handwritten contact information. It looks like a, I 13:19:32

21 guess, a fax confirmation sheet. 13:19:37

22 Q. Mr. Kenney, do you know the disposition of this 13:19:40

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1 matter? 13:19:43

2 A. I believe that Ms. Oliver, Karen Oliver, has 13:19:43

3 spoken to Benton screen -- Silkscreening recently about 13:19:58

4 this issue and has been told that they no longer print 13:20:04

5 these shirts for the American Red Cross, although it 13:20:13

6 appears that the American Red Cross still does distribute 13:20:19

7 at least some of these shirts. 13:20:27

8 Q. Is there any other correspondence exchanged 13:20:31

9 between the parties regarding this? 13:20:34

10 A. I'm not aware of any other correspondence. 13:20:36

11 Q. If I could have you turn to the third page of 13:20:39

12 Exhibit 57 -- 13:20:43

13 A. Yes. 13:20:44

14 Q. -- and can you describe for me the context in 13:20:44

15 which the words "life is good" is being made. 13:20:49

16 A. I think this is a design that's on a T-shirt for 13:20:54

17 the American Red Cross and "life is good" is included in 13:21:00

18 the T-shirt design. 13:21:08

19 Q. Is it your client's understanding that "life is 13:21:12

20 good" is being used as a brand name in this context? 13:21:16

21 A. I don't know what my client's understanding is. 13:21:20

22 Q. Well, do you have an understanding? 13:21:26

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1 earlier today, as words having a meaning other than as the 13:23:19
2 trademark of your client? 13:23:27
3 A. Yes. 13:23:29
4 Q. And would that be the meaning that you attribute 13:23:29
5 to these words? 13:23:32
6 A. I don't know. I haven't formed an opinion as to 13:23:35
7 what the meaning is in this context. 13:23:44
8 Q. But we do know that it's not in trademark use? 13:23:46
9 A. I don't believe it is. 13:23:50
10 Q. You believe this is a trademark use? 13:23:51
11 MR. KIRBY: He said, he doesn't 13:23:54
12 believe -- 13:23:56
13 THE WITNESS: I said I don't believe 13:23:56
14 so. I'm sorry, Mark. 13:23:58
15 MR. SOMMERS: Thank you. 13:24:02
16 Q. (By Mr. Sommers) Do you know why your client 13:24:03
17 challenged that use? 13:24:08
18 A. I don't. 13:24:08
19 MR. SOMMERS: If I could have the 13:24:13
20 next document marked as Exhibit 58, a 13:24:19
21 letter dated December 30, 2004. 13:24:24
22 (Exhibit 58, Wisconsin Department of

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1 Tourism Correspondence, marked for
2 identification.) 13:24:48

3 Q. (By Mr. Sommers) Mr. Kenney, if you could 13:24:48
4 describe for me what Exhibit 58 is. 13:24:51

5 A. Exhibit 58 is a two-page letter from Roger Stein, 13:24:55
6 who's an attorney who provided services for Life is Good, 13:25:00
7 Inc., to the Wisconsin Department of Tourism. 13:25:05

8 Q. And what is the subject matter of the exhibit? 13:25:08

9 A. The Wisconsin Department -- as I understand it, 13:25:13
10 the Wisconsin Department of Tourism was going to be 13:25:17
11 starting a tourism marketing campaign and was considering 13:25:20
12 using the designation "life is good" in connection with 13:25:29
13 that campaign. 13:25:32

14 Q. Do you have an understanding what else happened? 13:25:33

15 A. I believe that there was a meeting between 13:25:38
16 representatives of Life is Good and representatives of the 13:25:43
17 Department of Tourism of Wisconsin to discuss the issue. I 13:25:45
18 believe there was some other letters exchanged. 13:25:51

19 Q. In addition to Exhibit 58? 13:25:54

20 A. Yes. 13:25:56

21 Q. Do you know what the disposition of this matter 13:25:56
22 was? 13:25:59

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1 A. The Wisconsin Department of Tourism decided to 13:26:00
2 adopt a different designation. 13:26:03
3 Q. What's that designation? 13:26:05
4 A. I believe it's either going to be or is "life's so 13:26:07
5 good." 13:26:14
6 Q. And has that been resolved to the satisfaction of 13:26:16
7 your client? 13:26:20
8 A. I don't know the answer to that. 13:26:21
9 Q. Who would I have to get the answer from? 13:26:26
10 A. I would assume from Burt Jacobs or John Jacobs. 13:26:29
11 Q. Do you know whether your client maintains any 13:26:38
12 continuing objection? 13:26:42
13 A. I'm not aware of one. 13:26:43
14 Q. Do you know the context in which Wisconsin uses 13:26:45
15 the words "life's so good"? 13:27:07
16 A. I don't. 13:27:10
17 Q. Who would be the individual who would know that? 13:27:12
18 A. At Life is Good? 13:27:18
19 Q. Yes. 13:27:20
20 A. It would be someone who was involved in that 13:27:23
21 meeting, I assume, with the Wisconsin Department of 13:27:29
22 Tourism, which, if my memory is correct, was Burt Jacobs 13:27:33

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1 and Roy Heffernan, but I'm not sure. That's my memory of 13:27:38

2 who attended that meeting. 13:27:45

3 Q. So, to your knowledge, no additional action has 13:27:50

4 been taken? 13:27:55

5 A. Once the "life's so good" designation was chosen, 13:27:59

6 that's accurate. 13:28:06

7 Q. Mr. Kenney, are you aware of a company named Top 13:28:43

8 Dog? 13:28:47

9 A. Yes. 13:28:47

10 Q. What can you tell me about them? 13:28:48

11 A. It's a company that, as I understand it, produces 13:28:50

12 some T-shirts. 13:28:52

13 Q. Anything else? 13:28:57

14 A. Any other products you mean? 13:29:00

15 Q. No. Is there anything else you can tell me about 13:29:02

16 them? 13:29:04

17 A. Yes. We've had a -- well, Life is Good has had a 13:29:04

18 dispute with Top Dog regarding a T-shirt that it was 13:29:08

19 selling. 13:29:11

20 Q. What was the particular product at issue? 13:29:12

21 A. It was a T-shirt, if I'm recalling the correct one 13:29:15

22 and I hope I am, that showed some type of dog -- I'm not 13:29:22

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1 good with dog pedigrees or types -- and the -- said on the 13:29:27
2 T-shirt, "When you're the top dog, life is good." 13:29:37

3 Q. Did your client contest that use? 13:29:46
4 A. Yes. 13:29:50

5 Q. And what was the grounds for contesting that use? 13:29:52
6 A. I believe it was that use of "life is good" in 13:29:57
7 connection with the T-shirt was likely to cause confusion 13:30:03
8 with Life is Good's use. 13:30:07

9 Q. Was there any other basis? 13:30:09
10 A. I can't remember. 13:30:18

11 Q. Mr. Kenney, in connection with your client's 13:30:33
12 enforcement efforts of its mark, has it ever made a 13:30:46
13 determination that a particular use was likely to blur the 13:31:05
14 distinctiveness of its Life is Good trademark? 13:31:18

15 A. I can't recall if it has. 13:31:26

16 Q. To your knowledge, has your client ever raised an 13:31:31
17 allegation that another party's use of the words "life is 13:31:39
18 good" resulted in a blurring of the distinctiveness of its 13:31:46
19 trademark? 13:31:55

20 A. It may have. I can't recall any specifics. 13:31:55

21 Q. Do you have any recollection of making an 13:32:01
22 allegation of dilution by blurring? 13:32:08

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1 identification.) 13:43:17

2 Q. (By Mr. Sommers) Mr. Kenney, am I correct that 13:43:17

3 your earlier testimony was that your client's Life is Good 13:43:44

4 trademark is among the most famous trademarks in the U.S.? 13:43:50

5 A. I believe what I said is depending on how wide you 13:43:56

6 defined "among the most famous," I think at some point it 13:44:00

7 probably fits in there. 13:44:04

8 Q. How wide would that definition be? 13:44:06

9 A. I really couldn't say. 13:44:09

10 Q. If I -- could you explain -- let me strike that. 13:44:17

11 Can you describe for me what Exhibit 59 is. 13:44:22

12 A. Yes. It is an e-mail that was sent to Life is 13:44:26

13 Good. I believe it was sent by one of Life is Good's 13:44:35

14 retailers. 13:44:52

15 Q. And who was it sent to? 13:44:53

16 A. It was sent to someone at Life is Good and 13:44:55

17 forwarded as an attachment, and I don't remember who at 13:45:02

18 Life is Good received it. 13:45:06

19 Q. And who is Mary? 13:45:06

20 A. Mary, I believe, is a retailer, an employee of one 13:45:09

21 of the retail stores that sells Life is Good. 13:45:13

22 Q. Do you know when this document was prepared? 13:45:15

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1 A. It was recently, I believe within the past year. 13:45:22

2 Q. If I could refer you to the second paragraph 13:45:26

3 there, it refers to a use of Ford of the words "life is 13:45:32

4 good." Do you see that? 13:45:37

5 A. Yes. 13:45:38

6 Q. And it appears that it's on the Chicago News every 13:45:39

7 night. Do you see that? 13:45:43

8 A. That's what it says, yes. 13:45:45

9 Q. What can you tell me about that particular use? 13:45:46

10 A. Nothing beyond what's written here. 13:45:49

11 Q. To your knowledge, has your client taken any 13:45:51

12 action against Ford? 13:45:57

13 A. Not that I'm aware of. 13:45:58

14 Q. To your knowledge, has your client looked into 13:46:00

15 this use? 13:46:03

16 A. I'm not aware of what they've done to look into 13:46:03

17 it. 13:46:09

18 Q. Do you know if they've undertaken any enforcement 13:46:09

19 efforts? 13:46:13

20 A. I don't know. 13:46:14

21 Q. I'd refer you to the second part of that that 13:46:16

22 discusses Wal-Mart using the phrase to advertise their 13:46:19

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1 camping stuff. Do you see that? 13:46:24

2 A. Yes. 13:46:25

3 Q. To your knowledge, has any enforcement actions 13:46:26

4 been taken by your clients against Wal-Mart? 13:46:29

5 A. I'm not aware of any. 13:46:32

6 Q. Are you aware of any particular contact that has 13:46:34

7 been made by your client with Wal-Mart? 13:46:38

8 A. I'm not aware of any. 13:46:40

9 Q. Are you aware of whether your client took any 13:46:42

10 steps to investigate that use? 13:46:45

11 A. I don't know the answer to that. 13:46:47

12 Q. Did you, on their behalf, undertake any 13:46:49

13 investigation? 13:46:52

14 A. No. 13:46:53

15 Q. To your knowledge, did anybody undertake an 13:46:55

16 investigation on their behalf? 13:46:58

17 A. Not that I'm aware of. 13:47:00

18 Q. I see next the paragraph that talks about the 13:47:02

19 Wisconsin Tourism "life's so good" advertisement. Do you 13:47:06

20 see that? 13:47:11

21 A. Yes. 13:47:11

22 Q. Would that be the same advertisement that we 13:47:12

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